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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1258

CONTINENTAL MARKETING CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 36–45) is reported at 387 F. 2d 466. The findings of fact and conclusions of law of the district court (Pet. App. 10–23) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. The petition for a writ of certiorari was filed on March 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the sale, by an organization seeking to raise capital to establish a domestic beaver industry, of pairs of live beavers that were to be housed, cared for and bred for the purchasers at a profit, constituted the public sale of investment contracts under the federal securities laws.

STATUTES INVOLVED

Section 2(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(1), defines "security" to include

> * * * any * * * certificates of interest or participation in any profit-sharing agreement * * * investment contract, * * * or, in general, any interest or instrument commonly known as a "security", * * *.

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(10), includes the same language in its definition of "security."

STATEMENT

Petitioner has been selling to the public pairs of beavers, which were to be housed, cared for, and bred at a profit. Petitioner was organized in 1965 to carry out one part of what its literature denominated a "program" to establish a "domestic beaver industry." The overall program had been created some years earlier by Mark Weaver (R 497 DF 2, 507, 520 WB 1).[1] Petitioner's role was to sell to members of the

[1] "R" refers to pages of the record. "R" 497 DF" refers to pages of Petitioner's brochure entitled "The Diamond of Furs" and "R 520 WB" refers to pages of a brochure entitled "Weavers' Beavers" and bearing a picture of a woman identified as

public live beavers as an investment; other participants in the program performed the various activities represented by petitioner to be necessary both to make the ownership of beavers profitable and to achieve the program's goal—a herd of domestic, pen-born beavers in sufficient numbers to provide the fur markets with a constant supply of domestic beaver pelts (R 491). Basically, these activities ("the management activities") involved "ranching," providing medical care for and breeding the beavers.

In its sales literature petitioner identified itself as "a representative" of the domestic beaver industry and announced that "a program has been organized which makes possible large profits for the individual beaver owner and at the same time gives the industry the money it needs to grow and develop" (R 497 DF 1, 2; 489–490). The program's premise was that "[t]he history of ranching fur-bearing animals shows that domestication brings about a marked increase in the price of pelts" (R 497 DF 7–8) and that domestication of beavers would generate the "[f]ortunes [that] have been made in the domestication of mink" (R 497 DF 9). Because the industry had not yet reached "the pelting stage," petitioner offered members of the public "an opportunity to share in the profits of the breeding stock stage" (R 489–490), "the most lucrative stage in the development of the beaver industry" (R

Edith Weaver on its cover page. The brochures are not numbered as separate pages of the record but are incorporated into the record in envelopes. Each envelope bears a single page number and contains unnumbered documents other than the brochures cited herein.

497 DF 13), by selling them pairs of live beavers which would be used as breeders. The district court noted that petitioner charged prices ranging between $1,000 and $3,000 per beaver (Pet. App. 17), even though "[t]here is no market for live beaver at prices in excess of $100 per beaver (live beaver can be purchased for as little as $20 each), except the market created and maintained by the defendants * * *" (Pet. App. 29, 18).[2]

While investors could elect to take possession of the beavers, petitioner's salesmen, reaffirming the sales literature's opening maxim—"[o]ne good investment is worth a lifetime of toil" (R 497 DF 1)—informed investors that all they had to do was buy the beavers, leave them on existing ranches, and pay ranching fees (R 888–c, 924–925); the beavers would reproduce and the offspring could be sold by petitioner and the owners would reap "geometric profits" (R 491, 493, 522). In fact, no member of the public who bought beavers from petitioner ever took possession of his beavers; each availed himself of the management activities recommended by petitioner and performed by the other participants in the program (R 698).

[2] The district court found that from 1932 to the time of trial, "the highest average price at which a lot of beaver pelts had sold was $70 per pelt and generally $20 to $40 per pelt, and as low as $6.15 per pelt, notwithstanding the defendants have been representing that ranching fees are $72 per year for each beaver and that it takes more than a year for a beaver to reach maturity and that the purchaser will profit from investing in beaver at prices of $2,000 to $6,000 per pair" (Pet. App. 18).

The beavers offered to the public were represented to be the domestic, pen-born offspring of 60 pairs of beavers belonging to Mark Weaver (R 888–A), which had been scientifically raised and bred in special facilities located on ranches operated by other participants in the program (R 497 DF 1, 3; 489–491). Petitioner's sales literature encouraged purchasers to leave their beavers on the "approved" ranches, where they were located at the time of the sale and where they would continue to be "expertly housed, fed, and otherwise cared for" (R 491) "by a team of specialists" (R 497 DF 3),[3] and identified by name and location the ranches where beavers purchased by investors could receive such professional care (R 497 DF 3, back outside cover). Upon making a sale, petitioner notified the operator of the ranch on which the beavers were located, thereby enabling the rancher to mail service contracts to the new owner for his signature (R 926).

Prior to 1965 all the selling and most of the management activities of the program had been carried on by the North American Beaver Association ("NABA"), which Mark Weaver had formed (R

[3] Purchasers of beavers were advised that special facilities, which cost $20,000 to build, were needed to house beavers. These special facilities included a private swimming pool, patio, den and nesting box for each pair of beavers (R 75, 459–491; 497 DF 3; 552, 923). They were also advised that beavers require specialized care, a constant flow of large quantities of fresh water, special food which had to be varied with climatic conditions and expert veterinary, dental, tatooing and breeding services, and that only seven people in the United States could determine the sex of a beaver (R 888–B, 922–926).

3063, 3462).[4] In 1965, after the Commission's staff had begun an informal investigation, the operation of the program was changed because "it appeared that the divorcement of sales activity from beaver care was necessary to avoid possible violation of SEC regulations and to insure unhampered growth of the beaver industry" (R 507). Petitioner, formed by persons who had been salesmen of NABA (R 1809–1811, 2784–2787), was one of three "selling organizations" which then emerged (R 1823–1824, 2102–2104).[5]

In 1966 the Commission brought suit against all the participants in the program, seeking to enjoin them from further violations of the registration and antifraud provisions of the securities laws.[6] After a

[4] The ranching of the beavers was carried on by NABA members. Other management activities, principally record-keeping and "expert supervision" of the ranchers, were performed by another entity formed by Weaver, American-Canadian Beaver Company, Inc. (R 3063).

[5] At about the same time, the ranching activities were divided between two entities and the "expert services" were divided between two other entities. Petitioner also offered and sold to purchasers of beavers warranties of NABA for the replacement of the beavers in the event of death or nonproduction (R 497 DF 4; 935). The warranties, which previously had been offered by NABA salesmen (R 728, 733–734, 796–797, 839, 1731), were represented by petitioner as giving "an assurance of at least two additional beaver for each pair purchased" (R 497 DF 4). The purchaser of the NABA warranty would pay petitioner for the warranty and petitioner would then transmit the money to NABA (R 1876–1878). The warranty was effective only if the animals were "husbandried" according to the accepted practice and standards of the "Domestic Beaver Industry" (R 935).

[6] Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e and 77q(a); and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

hearing, the district court determined that the defendants were offering and selling investment contracts involving the "sale, care, management, replacement, feeding and resale of live beaver for investment" (Pet. App. 11) and had made misleading statements in connection therewith (Pet. App. 16). It preliminarily enjoined them from further offers and sales of the securities in violation of the antifraud provisions[1] of the securities laws (Pet. App. 24–35).

In the court of appeals, petitioner challenged the district court's holding that it was offering and selling investment contracts but did not contest the district court's findings of fraud. The court of appeals, relying on *Securities and Exchange Commission* v. *Howey Co.*, 328 U.S. 293, and *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344, sustained the district court, stating: "We do not think the element of ownership or control [between the seller and manager of the property which is the subject of an investment contract] is essential * * *. The more critical factor is the nature of the investor's participation in the enterprise" (Pet. App. 42–43). Focusing upon the nature of that participation, it ruled: "Investment by members of the public was a profit-making venture in a common enterprise, the success of which was inescap-

[1] The district court also held that the defendants' activities violated the registration provisions of the Securities Act of 1933. Upon a balancing of the equities, it concluded that, at the preliminary stage of the proceeding, the protection of investors and the public interest did not also require an injunction to obey the registration requirements (Pet. App. 21).

ably tied to the efforts of the ranchers and the other defendants and not to the efforts of the investors" (Pet. App. 44).

ARGUMENT

The decision of the court below is correct and in accord with principles settled by prior decisions of this Court and other courts of appeals. The petition presents no question warranting further review.

It has long been held that animals may be the subject of investment contracts within the meaning of laws regulating securities transactions. See, *e.g., Securities and Exchange Commission* v. *Payne,* 35 F. Supp. 873 (S.D.N.Y.) (silver foxes), and *Stevens* v. *Liberty Packing Corp.,* 111 N.J. Eq. 61, 161 A. 193 (rabbits), both cited with approval by this Court in *Joiner, supra,* 320 U.S. at 352–353, footnote 10. See, also, *Hollywood State Bank* v. *Wilde,* 70 Cal. App. 2d 103, 160 P. 2d 846 (Dist. Ct. App.) (chinchilla).

Petitioner apparently does not contest this proposition, but it argues that the applicability of the federal securities laws to investment contracts does not include the situation where those who seek to obtain the "use of the money of others on the promise of profits" (*Howey, supra,* 328 U.S. at 299) have arranged to divide their labors. This contention would make the protections of the federal securities laws depend upon a meaningless distinction, as this case amply demonstrates.

The economic position of the members of the public, who were induced to purchase beavers as an invest-

ment before, during and after the 1965 reorganization from which petitioner emerged as a separate sales corporation, remained unaltered. The role of members of the public at all times was that of furnishing the capital for the enterprise—providing "the industry the money it needs to grow and develop" (see page 3, *supra*). Their position in the enterprise, like that of purchasers of other securities in the form of investment contracts, was continuously characterized by "a complete separation of ownership and management, * * * in which the owner takes no part, other than investing * * *"; [8] where the promised profits would come, if ever, "solely from the efforts of others" (*Howey, supra,* 328 U.S. at 301; *Tcherepnin* v. *Knight,* 389 U.S. 332, 338).

Moreover, from the standpoint of investors—the persons to be protected by the federal securities laws—it is immaterial whether petitioner or others recommended by petitioner would actually perform the management activities. "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey, supra,* 328 U.S. at 301; *Tcherepnin, supra,* 389 U.S. at 338. As were the defendants in *Howey, supra* (328 U.S. at 301), petitioner was offering "the essential ingredients of an investment con-

[8] *Securities and Exchange Commission* v. *Earl,* 41 F. Supp. 647, 650 (S.D. Fla.), companion case to *Securities and Exchange Commission* v. *Bailey,* 41 F. Supp. 647 (S.D. Fla.), cited with approval in *Securities and Exchange Commission* v. *Howey Co.,* 328 U.S. at 299 (footnote 5), and *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U.S. at 352 (footnote 10).

tract." That the sales and management are provided by different entities is immaterial. *Roe* v. *United States*, 287 F. 2d 435, 439 (C.A. 5), certiorari denied, 368 U.S. 824; *Securities and Exchange Commission* v. *Orange Grove Tracts*, 210 F. Supp. 81, 83 (D. Mass.). The fact that the prices petitioner was charging were "incongruous" in relation to the prices at which live beavers or beaver pelts were otherwise available (Pet. App. 19, see pp. 3–4 *supra*) graphically verifies the otherwise amply documented conclusion of the courts below that petitioner was not merely selling live beavers but was soliciting participation by the public in an investment scheme.

In short, this case involves merely one more of "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," which have been covered over the years by the *Howey* test (328 U.S. at 299).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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